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### Constitutional and Family Law—Grandparent Visitation in the Face of the Fourteenth Amendment Due Process Clause: Parental or Grandparental Rights? *Troxel v. Granville*, 530 U.S. 57 (2000).

Oliver G. Hahn

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CONSTITUTIONAL AND FAMILY LAW—GRANDPARENT  
VISITATION IN THE FACE OF THE FOURTEENTH AMENDMENT DUE PROCESS  
CLAUSE: PARENTAL OR GRANDPARENTAL RIGHTS? *Troxel v. Granville*,  
530 U.S. 57 (2000).

I. INTRODUCTION

*Therefore do not imagine that the parental office is a matter of your pleasure and whim.*<sup>1</sup>

Many children grow up with either only one parent or even entirely in their grandparents' homes.<sup>2</sup> All the while, particularly in custody disputes, grandparents have become increasingly aware of their grandchildren's plights and their own rights, or lack thereof.<sup>3</sup> Every state has enacted so-called grandparent visitation statutes that attempt to enable grandparents to maintain a relationship with their grandchildren, at times even against the wishes of the parents.<sup>4</sup> However, the United States Supreme Court recently ruled that section 26.10.160(3) of the Revised Code of Washington<sup>5</sup> violated the United States Constitution in that it encroached on the fundamental parental right to determine matters of "care, custody, and control" of the children.<sup>6</sup>

This note explores the *Troxel* decision and finds its significance in reaffirming parental rights in the face of a continuous fundamental rights debate and the need to balance those rights with grandparent and other third-party visitation. For this purpose, the note first examines the social changes in American family life and the political sense of crisis arising from those changes. It next surveys the history of parental rights cases and the ongoing debate regarding the so-called substantive due process analysis. In this context, the note illuminates the current attempts of the United States Supreme Court to curb the often perceived excessive substantive due process analysis of previous cases, and yet maintain a healthy dose of fundamental rights jurisprudence. The note further considers limitations to parental rights and the best-interest-of-the-child standard. In conclusion, the note briefly looks to the impact of

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1. THE LARGE CATECHISM OF MARTIN LUTHER 32 (Robert H. Fischer trans., Fortress Press 1959).

2. See *infra* notes 48-49 and accompanying text.

3. See *infra* notes 41-45 and accompanying text.

4. See *infra* note 53 and accompanying text.

5. WASH. REV. CODE ANN. § 26.10.160(3) (West 1997).

6. *Troxel v. Granville*, 530 U.S. 57, 75 (2000). Justice O'Connor announced the plurality opinion, joined by Chief Justice Rehnquist and Justices Ginsburg and Breyer; Justices Souter and Thomas filed concurring opinions; and Justices Stevens, Scalia, and Kennedy dissented. *Id.* at 73.

the *Troxel* decision on current state law, especially in Arkansas, as well as the general significance of the case for parental rights and future developments of third-party visitation laws.

## II. FACTS

When Brad Troxel and Tommie Granville ended their relationship, Brad moved back into his parents' home in Anacortes, Washington.<sup>7</sup> Brad and Tommie had lived together off and on for several years until June 1991, without ever marrying.<sup>8</sup> Their two daughters, Isabelle and Natalie,<sup>9</sup> regularly accompanied Brad for weekend visits to the Troxel home.<sup>10</sup> There, they saw their paternal grandparents, Jenifer and Gary Troxel.<sup>11</sup> In May 1993, approximately two years after Brad and Tommie had separated, Brad killed himself.<sup>12</sup> For the first few months after Brad's demise, the Troxel grandparents continued to see their granddaughters on a regular schedule.<sup>13</sup> However, Tommie Granville started a new relationship and family with Kelly Wynn, whom she married during the court battle soon to ensue.<sup>14</sup> In October 1993, Tommie

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7. *Id.* at 60; see also Brief for Petitioner at 2, *Troxel v. Granville*, 530 U.S. 57 (2000) (No. 99-138).

8. *Troxel*, 530 U.S. at 60. Apparently, Tommie and Brad had "lived together intermittently from 1988 to 1991." Brief for Petitioner at 2, *Troxel* (No. 99-138). Respondent's brief mentioned January 1989 as the starting point of the relationship. Brief for Respondent at 8, *Troxel v. Granville*, 530 U.S. 57 (2000) (No. 99-138).

9. Isabelle and Natalie were eighteen months and three years old, respectively, at the time the visitation dispute started. *Profile: Supreme Court to Focus on the Rights of Grandparents* (NPR radio broadcast, Jan. 12, 2000), available at 2000 WL 21478772 [hereinafter *Profile*]. Natalie's birthday was in November 1989, and Isabelle's in December 1991. Brief for Petitioner at 2, *Troxel* (No. 99-138).

10. *Troxel*, 530 U.S. at 60. The girls spent "every other weekend" with their father, according to a court-sanctioned parenting plan. Brief for Petitioner at 2, *Troxel* (No. 99-138).

11. *Troxel*, 530 U.S. at 60. The Troxels have three children other than Brad and eight grandchildren. Brief for Petitioner at 2 n.1, *Troxel* (No. 99-138).

12. See *Troxel*, 530 U.S. at 60.

13. *Id.* During the first months following Brad's suicide, Tommie Granville received help in caring for the children from Brad's siblings. Brief for Petitioner at 2, *Troxel* (No. 99-138); Brief for Respondent at 8, *Troxel* (No. 99-138). The Troxel grandparents visited the girls when they were in the care of Brad's siblings. *Id.* at 9.

14. *Troxel*, 530 U.S. at 61. Apart from Isabelle and Natalie, Tommie has three other children by Jeff Granville and one more child by Kelly Wynn. Brief for Petitioner at 2 n.2, *Troxel* (No. 99-138). Kelly Wynn brought two more children from a previous marriage into the Granville-Wynn household (bringing the total number of children to eight). *Id.*

Granville notified the grandparents that they were not to see the girls more than one short time per month.<sup>15</sup>

The Troxels reacted in December of the same year by petitioning the Washington Superior Court for Skagit County to receive visitation rights with their granddaughters.<sup>16</sup> They relied on two Washington statutes, of which only section 26.10.160(3) of the Washington Revised Code ultimately remained an issue in the case.<sup>17</sup> The Troxels demanded "two weekends of overnight visitation per month and two weeks of visitation each summer."<sup>18</sup> They abstained from any claim that Tommie Granville was not a fit mother.<sup>19</sup> While the mother, Tommie Granville, did not principally object to visitation, she wished to limit the Troxels to "one day of visitation per month with no overnight stay."<sup>20</sup> The dispute seemed to center on the quantity and quality of the visits rather than anything else.<sup>21</sup> In 1995, the Superior Court ordered visitation "one

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15. *Troxel*, 530 U.S. at 60-61. The increase of "spur-of-the-moment requests" to meet the girls worried Tommie. Brief for Respondent at 9, *Troxel* (No. 99-138). Tommie wanted to secure her "efforts to nurture her new blended family with Kelly Wynn." *Id.* Visitation ended in October 1993 and commenced again in April 1994 due to a temporary visitation order. Brief for Petitioner at 2, *Troxel* (No. 99-138). The parties offered differing views as to the reasons why there were no visits in this time period. *See id.* at 2 n.3. Tommie forbade telephone contact between the Troxels and their granddaughters in February 1994. *Id.* at 3. Visitation resumed from April 1994 until the end of 1998, after which the Troxels saw Isabelle twice and Natalie only once. *Id.* at 6. The parties do not agree on the reasons for this development. *Id.* at 6 n.10.

16. *Troxel*, 530 U.S. at 61. According to Tommie, the Troxels first contacted the state mediation service. *Profile, supra* note 9. Upon Tommie's response that there was no need for mediation, she did not hear again from the Troxels until "the day before our wedding, [when] we were served with papers." *Id.*

17. WASH. REV. CODE ANN. § 26.10.160(3) (West 1997). The section read as follows: "Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child, whether or not there has been any change of circumstances." *Id.* (emphasis added). The Washington Code now states that the United States Supreme Court has found the entire section 26.10.160 unconstitutional in the *Troxel* case. WASH. REV. CODE § 26.10.160 (West Supp. 2001).

18. *Troxel*, 530 U.S. at 61. The grandparents also asked for "reasonable time on holidays and school vacations, especially Thanksgiving weekend, the Christmas holidays, [and] Easter weekend." Brief for Respondent at 9, *Troxel* (No. 99-138).

19. *See* Brief for Petitioner at 3, *Troxel* (No. 99-138).

20. *Troxel*, 530 U.S. at 61. Petitioner's brief also acknowledged that all parties agreed that visitation was in the best interest of the children. Brief for Petitioner at 3, *Troxel* (No. 99-138). However, Tommie feared that overnight stays would not be a good idea until the girls had grown older. *Id.*

21. *See* Brief for Petitioner at 3, *Troxel* (No. 99-138). The grandmother, Jenifer Troxel, gave testimony that may mean more to some readers than to others: she "understood that [Tommie] preferred that the younger girl be called Isabelle, rather than her middle name Rose—the name that had been used by Brad—and agreed to honor that wish." *Id.* Tommie also testified that there had not been any conflict with the

weekend per month, one week during the summer, and four hours on both of the petitioning grandparents' birthdays."<sup>22</sup>

Tommie Granville appealed to the Washington Court of Appeals,<sup>23</sup> particularly because the visitation included overnight stays and a summer vacation.<sup>24</sup> The Washington Court of Appeals remanded, ordering the trial court to put in writing its findings of fact and conclusions of law.<sup>25</sup> The lower court complied, finding that the

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Troxels "in the presence of the children." *Id.* at 3-4. An expert witness on behalf of Tommie did not know of any differences between the Troxels and Granvilles "regarding discipline, religion, or any other important issue affecting the girls." *Id.* at 4 & n.7. But the trial judge's order contained certain provisions that shed further light on the situation: apart from the name Isabelle, the Troxels were to refrain from commenting to the girls about the circumstances of Brad's death until Tommie had agreed with them on a "joint explanation." *Id.* at 5. Neither party could freely exercise criticism of the other before the girls. *Id.* Tommie expressed concern that Brad's parents considered her daughters a "substitute" for Brad. Brief for Respondent at 10, *Troxel* (No. 99-138). Indeed, Mrs. Troxel later admitted that her initial visitation requests were "probably . . . too long," and "[i]t was too close to Brad's death." *Profile, supra* note 9. In her brief, Tommie also stated that especially Natalie appeared upset following visits with the Troxels. Brief for Respondent at 10, *Troxel* (No. 99-138). Tommie explained on NPR Morning Edition that, as soon as the family learned of her wedding with Kelly Wynn, "[a]ll of a sudden the aunts and uncles started asking to see the children, too, and it was like at least two times a week we were getting these requests," at a time when the girls were eighteen months and three years old. *Profile, supra* note 9. By the same token, Jenifer Troxel was afraid that Tommie might "cut [them] off altogether." *Id.*

22. *Troxel*, 530 U.S. at 61. The trial judge acknowledged that a more extended visitation could interfere with the need of the two girls spending time with the other siblings in their new family. Brief for Petitioner at 4, *Troxel* (No. 99-138); see also *supra* note 13 (discussing the blended family of the Granvilles and Wynns). The court-approved monthly visit was to extend from 4:30 p.m. on Saturday until 6 p.m. on Sunday. Brief for Petitioner at 4-5, *Troxel* (No. 99-138). Significantly, the trial judge explained his decision as follows:

I look back on some personal experiences . . . . We always spen[t] as kids a week with one set of grandparents and another set of grandparents, [and] it happened to work out in our family that [it] turned out to be an enjoyable experience. Maybe that can, in this family, if that is how it works out.

*Troxel*, 530 U.S. at 72.

23. *In re Troxel*, 940 P.2d 698 (Wash. Ct. App. 1997), *rev'd sub nom. In re Custody of Smith*, 969 P.2d 21 (Wash. 1998), *aff'd sub nom. Troxel v. Granville*, 530 U.S. 57 (2000).

24. Brief for Petitioner at 5, *Troxel* (No. 99-138).

25. *Troxel*, 940 P.2d at 699.

visitation was in the children's best interest.<sup>26</sup> A few months after the trial court's order, Kelly Wynn legally adopted Isabelle and Natalie.<sup>27</sup>

In spite of the trial court's legal and factual findings, the Washington Court of Appeals reversed and dismissed the Troxel's petition, holding that third parties, outside the context of a custody action, lack standing to file for visitation under section 26.10.160(3) of the Washington Revised Code.<sup>28</sup> The Washington Supreme Court accepted the case for review and affirmed.<sup>29</sup> The supreme court did not agree with the appellate court's assessment of standing in the case and found that the Washington visitation statute gave the Troxels standing to sue.<sup>30</sup> Nevertheless, the state supreme court arrived at the same conclusion, namely that the Troxels could not obtain visitation rights under section 26.10.160(3) of the code, because that statute violated the fundamental rights of parents to raise their children under the Federal Constitution.<sup>31</sup> In the state supreme court's opinion, the Constitution allows state interference with parental rights only "to prevent harm or potential

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26. *Troxel*, 530 U.S. at 61. The United States Supreme Court quoted the Washington Superior Court as follows:

The Petitioners [the Troxels] are part of a large, central, loving family, all located in this area, and the Petitioners can provide opportunities for the children in the areas of cousins and music . . . . The court took into consideration all factors regarding the best interest of the children and considered all the testimony before it. The children would be benefitted [sic] from spending quality time with the Petitioners, provided that that time is balanced with time with the children['s] nuclear family. The court finds that the children['s] best interests are served by spending time with their mother and stepfather's other six children.

*Id.* at 61-62. The Superior Court's obscure reference to music becomes clear when reading the petitioner's brief to the United States Supreme Court. See Brief for Petitioner at 2 n.1, *Troxel* (No. 99-138). The grandfather, Gary Troxel, belongs to a music group. *Id.*

27. *Troxel*, 530 U.S. at 62. The adoption took place in February 1996. *Smith*, 969 P.2d at 23.

28. *Troxel*, 940 P.2d at 700. The Court of Appeals found this limitation "consistent with the constitutional restrictions on state interference with parents' fundamental liberty interest in the 'care, custody, and management' of their children." *Id.*

29. *In re Custody of Smith*, 969 P.2d 21 (Wash. 1998), *aff'd sub nom. Troxel v. Granville*, 530 U.S. 57 (2000). The state supreme court consolidated the Troxel case with two others. *Id.* at 21. By the time the Washington Supreme Court issued its ruling, Tommie and her husband, Kelly Wynn, had spent more than \$50,000 before all three courts. *A Letter from the Parents in the Troxel v. Granville Case in the United States Supreme Court*, at <http://www.parentsrights.org/troxel/wynnlet.html> (last visited Feb. 5, 2001). Subsequently, the Granville-Wynns established the Wynn Legal Defense Fund for continuation before the United States Supreme Court. *Id.*

30. *Smith*, 969 P.2d at 26.

31. *Id.* at 30.

harm to a child."<sup>32</sup> The Washington statute at issue, however, did not require a "threshold showing of harm."<sup>33</sup> In addition, the supreme court found that the statute was overbroad in that "any person" could petition for visitation as long as the visitation was within the parameter of the best interest of the child standard.<sup>34</sup> The supreme court did not agree that a state might determine child-rearing questions just because a trial judge could imagine a "better" decision.<sup>35</sup> The Washington Supreme Court found that parents, rather than judges, "should be the ones to choose whether to expose their children to certain people or ideas."<sup>36</sup> The United States Supreme Court granted certiorari<sup>37</sup> because Washington's grandparent visitation statute confronted constitutional issues regarding parental rights.<sup>38</sup>

### III. BACKGROUND

American family life has changed over the last century, affecting the role of a considerable number of grandparents and other non-parental parties. What is more, the number of older Americans has risen,<sup>39</sup> and they are asserting their rights in familial disputes more than in the past.<sup>40</sup> Divorces, multiple and successive marriages, and single-parent family units jolt grandparents in their endeavors to gain access to their grandchildren. Against this background of societal changes, long-held constitutional notions regarding parental rights increasingly incur challenges by grandparents trying to assert visitation rights, or

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32. *Id.*

33. *Troxel*, 530 U.S. at 63; *Smith*, 969 P.2d at 30.

34. *Smith*, 969 P.2d at 30.

35. *Id.* at 31.

36. *Id.* at 63. However, four justices of the Washington Supreme Court dissented. *Id.* at 23 (Talmudge, J., concurring/dissenting).

37. *Troxel v. Granville*, 527 U.S. 1069 (1999).

38. The Court limited its review to the question of whether the Washington statute violated the United States Constitution "as applied to Tommie Granville and her family." *Troxel*, 530 U.S. at 65. Court observers were astonished when the United States Supreme Court granted certiorari. *Profile, supra* note 9. It was at the time the United States Supreme Court granted certiorari that Natalie and Isabelle Wynn learned of the lawsuit, when their grandparents handed videotapes of the two to local TV stations. *Id.* Isabelle and Natalie were then seven and nine years old, respectively. Brief for Petitioner at 21, *Troxel* (No. 99-138).

39. Amy K. Berman, Note, *H.R. 4300, The Family and Medical Leave Act of 1986: Congress' Response to the Changing American Family*, 35 CLEV. ST. L. REV. 455, 457 (1987).

40. See Edward M. Burns, *Grandparent Visitation Rights: Is It Time for the Pendulum to Fall?*, 25 FAM. L.Q. 59, 59 (1991).

even obtain custody, despite the wishes of the parents. After a brief glimpse at the changing realities of American families, this section examines the constitutional development of parental rights as a substantive due process issue.

#### A. Changing Realities of American Families and the States' Response

By the 1980s, members of the older generations became more assertive of their concerns and rights in family issues.<sup>41</sup> Moreover, approximately seventy-five percent of Americans were grandparents.<sup>42</sup> At the same time, approximately one million grandchildren per year had to endure their parents' divorces.<sup>43</sup> Such family dissolutions often imposed great hardship on the grandparents' ability to visit their grandchildren.<sup>44</sup> Children were increasingly likely to live with a single parent, or in a "blended" family, as a result of divorce and remarriage.<sup>45</sup>

Today, the trends of the 1980s have progressed even more.<sup>46</sup> The number of grandparents taking on the role of "long-term or permanent caregivers" has risen sharply.<sup>47</sup> The March 1998 Current Population Survey found that approximately twenty million children under the age of eighteen, roughly twenty-eight percent, lived in one-parent households.<sup>48</sup> The same study revealed that approximately four million children (almost six percent of all children under the age of eighteen)

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41. *Id.*

42. *Id.*

43. *Id.*

44. *See id.*

45. Steven H. Hobbs, *We Are Family: Changing Times, Changing Ideologies and Changing Law*, 14 CAP. U. L. REV. 511, 512 (1985).

46. *See* Susan Dawson-Tibbits, *Representing Grandparents Who Raise Grandchildren: An Overview of Illinois Law*, 87 ILL. B.J. 468, 468 & n.1 (1999).

47. *Id.*; *see also* Catherine Bostock, Note, *Does the Expansion of Grandparent Visitation Rights Promote the Best Interests of the Child?: A Survey of Grandparent Visitation Laws in the Fifty States*, 27 COLUM. J.L. & SOC. PROBS. 319, 323 n.22 (1994) (emphasizing that society reassesses grandparent rights because their roles within the families "have already changed in response to family problems").

48. TERRY A. LUGAILA, U.S. CENSUS BUREAU, MARITAL STATUS AND LIVING ARRANGEMENTS: MARCH 1998 (UPDATE) i (1998). According to this study, 34.7% of people between the ages of twenty-five and thirty-four had never married, while only 56% of all adults were currently married. *Id.* In the same year, 9.8% of the adults were currently divorced. *Id.* Most single-parent children, 84.1%, resided with their mothers, of which number approximately 40% stayed with mothers who had never married. *Id.* Children living with their father more typically were in the care of a divorced father (44.4%) than a bachelor (33.3%). *Id.* Single-parent households often had no other adults living in the same household (55.7%). *Id.*



stayed with their grandparents.<sup>49</sup> Thus, the meaning of "family" can assume many different shapes, and therefore pose a formidable task of adaptation for the law<sup>50</sup>—not even to mention all the possible future changes specifically for family law in the course of the twenty-first century.<sup>51</sup>

In the meantime, however, these changes have led to a greater grandparent lobby.<sup>52</sup> State legislatures, in turn, reacted by passing laws concerning grandparent visitation rights.<sup>53</sup> As a result, apart from the now obsolete Washington statute,<sup>54</sup> all states have some form of grandparent visitation statute.<sup>55</sup> Among those statutes, the "first

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49. *Id.* Among those children living with their grandparents, 1.4 million had neither parent available. *Id.* The newly released tables of the 2000 Census list 7.2% of all American households as "female householder, no husband present," with children under 18 years. U.S. CENSUS BUREAU, PROFILE OF GENERAL DEMOGRAPHIC CHARACTERISTICS FOR THE UNITED STATES, TABLE DP-1 (2000), available at [http://www.census.gov/Press-Release/www/2001/tables/dp\\_us\\_2000.PDF](http://www.census.gov/Press-Release/www/2001/tables/dp_us_2000.PDF). For Arkansas, the percentage is 7.4. *Id.* The number of families with no husband present (21% increase) rose three times faster than "married-couple families" (7% increase). See Press Release, United States Census Bureau, Nation's Median Age Highest Ever, But 65-and-Over Population's Growth Lags, Census 2000 Shows (May 16, 2000), available at <http://www.census.gov/Press-Release/www/2001/cb01cn67.html>.

50. See Hobbs, *supra* note 45, at 513. Hobbs questions whether "our notions on the family in society [have] changed so much that the assumptions upon which our family laws are based are no longer valid, thus rendering family law ineffective as a mechanism for ordering family life." *Id.* See generally Sally B. Gold, *The Changing Family Structure in the 20th Century*, MD. B.J., Jan.-Feb. 2000, at 15 (discussing Maryland family law changes in the face of familial-structural developments of the last hundred years).

51. See Gold, *supra* note 50, at 19. Gold predicts resolutions and changes regarding same-sex marriages and their respective consequences in custody and visitation rights. *Id.* She also expects changes because of the rapidly developing reproduction technology. *Id.* Family law should also undergo changes because of new concepts like cyberspace adultery, changed parental availability for child care (and custody) due to an increase in telecommuting, and new types of property interests to be considered in divorce proceedings. *Id.*

52. Burns, *supra* note 40, at 59; see also Bostock, *supra* note 47, at 322 (emphasizing that the "demographic composition of the voting public has increased the political power of older Americans"); *id.* at 325 (discussing the "formidable political force of the 'senior lobby'"). As an interesting aside, six of the nine United States Supreme Court Justices are grandparents as well, and Justice Thomas grew up in his grandparents' home. Ben Fenton, *US Court Asked to Rule on Grandparent Rights*, DAILY TELEGRAPH, Jan. 13, 2000, available at 2000 WL 2842364.

53. Burns, *supra* note 40, at 59-60; see also Hobbs, *supra* note 45, at 514 (asserting that law reform follows "changing mores, experiences, realities and ideologies of society").

54. See WASH. REV. CODE ANN. § 26.10.160 (West Supp. 2001).

55. See David L. Walther, *Survey of Grandparents' Visitation Rights*, 11 AM. J. FAM. L. 95, 104 (1997). See generally ALA. CODE §§ 30-3-4.1, 26-10A-30 (Supp. 2000); ALASKA STAT. § 25.24.150(a) (Michie 2000); ARIZ. REV. STAT. ANN. § 25-409 (West

generation" statutes concerned grandparent visitation "with their deceased child's children."<sup>56</sup> The "second generation" statutes also reached out to grandparents whose children failed to obtain custody in family dissolution cases.<sup>57</sup> Some states provide for grandparent visitation in certain kinds of adoption cases,<sup>58</sup> or in cases where there is proof of paternity of extra-marital children.<sup>59</sup> Twenty-one states allow grandparent visitation premised exclusively on the "best interest of the

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2000); ARK. CODE ANN. § 9-13-103 (Michie Repl. 1998); CAL. FAM. CODE §§ 3103-3104 (West 1994); COLO. REV. STAT. ANN. §§ 19-1-117, -117.5 (West 2000); CONN. GEN. STAT. ANN. § 46b-59 (West 1995); DEL. CODE ANN. tit. 10, § 1031(7) (Repl. 1999); FLA. STAT. ANN. chs. 752.01, 39.509 (West Supp. 2001); GA. CODE ANN. § 19-7-3 (Supp. 1999); HAW. REV. STAT. § 571-46.3 (Supp. 1999); IDAHO CODE § 32-719 (Michie 1996); 750 ILL. COMP. STAT. ANN. 5/607(b)(1) (West Supp. 2000); IND. CODE ANN. §§ 31-17-5-1 to -10 (Michie 1997); IOWA CODE ANN. § 598.35 (West Supp. 2000); KAN. STAT. ANN. § 38-129 (2000); KY. REV. STAT. ANN. § 405.021 (Michie 1999); LA. CHILDREN'S CODE ANN., art. 1264 (West 1995); ME. REV. STAT. ANN. tit. 19, §§ 1801-1804 (West 1998); MD. CODE ANN., FAM. LAW § 9-102 (Repl. 1999); MASS. GEN. LAWS ANN. ch. 119, § 39D (West Supp. 2000); MICH. COMP. LAWS ANN. § 722.27b (West Supp. 2000); MINN. STAT. ANN. § 257.022 (West Supp. 2001); MISS. CODE ANN. § 93-16-3 (1994); MO. ANN. STAT. § 452.402 (West Supp. 2001); MONT. CODE ANN. § 40-9-102 (1999); NEB. REV. STAT. ANN. § 43-1802 (Lexis Repl. 1999); NEV. REV. STAT. ANN. §§ 125C.050, 432B.560(1)(c) (Michie Supp. 1999 & Lexis Repl. 2000); N.H. REV. STAT. ANN. § 43-458:17-d (Supp. 2000); N.J. STAT. ANN. § 9:2-7.1 (West Supp. 2000); N.M. STAT. ANN. § 40-9-2 (Michie Repl. 1999); N.Y. DOM. REL. LAW §§ 72, 240(1) (McKinney 1999 & Supp. 2001); N.C. GEN. STAT. §§ 50-13.2(b1), -13.2A, -13.5(j) (Lexis 1999); N.D. CENT. CODE § 14-09-05.1 (Repl. 1997) (held unconstitutional by the North Dakota Supreme Court in *Hoff v. Berg*, 595 N.W.2d 285, 291 (N.D. 1999), because the state had no compelling interest to assume that grandparent visitation was in the child's best interest without first affording the parents an opportunity to rebut this presumption); OHIO REV. CODE ANN. §§ 3109.05.1(B)(1), 3109.11, 3109.12 (Anderson Repl. 2000); OKLA. STAT. ANN. tit. 10, §§ 5, 7505-6.5 (West Supp. 2001); OR. REV. STAT. § 109.121 (Supp. 1998); 23 PA. CONS. STAT. ANN. §§ 5311-5314 (West Supp. 2000); R.I. GEN. LAWS §§ 15-5-24.1 to -24.3 (1996); S.C. CODE ANN. § 20-7-420(33) (West Supp. 2000); S.D. CODIFIED LAWS §§ 25-4-52, -54 (LEXIS Rev. 1999); TENN. CODE ANN. § 36-6-302 (Supp. 2000); TEX. FAM. CODE ANN. §§ 153.433-153.434 (West Supp. 2001); UTAH CODE ANN. §§ 30-3-5(4)(a), -5-2 (Supp. 2000); VT. STAT. ANN. tit. 15, §§ 1012, 1013 (Repl. 1989); VA. CODE ANN. §§ 20-124.1, -124.2 (Michie Repl. 2000); W. VA. CODE ANN. § 48-2B-1 (LEXIS Repl. 1999); WIS. STAT. ANN. §§ 767.245, 880.155 (West Supp. 2000); WYO. STAT. ANN. § 20-7-101 (LEXIS 2001).

56. Walther, *supra* note 55, at 95. Statutes referring only to visitation with the dead offspring's children were among the earliest of their kind. *Id.*

57. *Id.* Of these statutes, many eventually also covered grandparents whose children did obtain custody. *Id.*

58. *Id.* This refers especially to stepparent adoptions. *Id.*

59. *Id.* Arkansas courts have given grandparent visitation in cases involving proof of paternity of extra-marital children. Interview with Robin L. Mays, Circuit Judge, Pulaski County Circuit Court, in Little Rock, Ark. (Apr. 2001).

child," without regard to trigger-events such as divorce or death.<sup>60</sup> Of course, this standard, the best interest of the child, comes in variations.<sup>61</sup>

Nonetheless, the mere fact that all states have some form of grandparent visitation appears to indicate that a sizable section of society deems the role of grandparents beneficial to the child.<sup>62</sup> A familial "sense of crisis" pervades the grandparent movement, feeding into fond and popular imaginations of the extended family of the past.<sup>63</sup> In the eyes of politicians and courts, grandparents turn into family value "watchdogs" and emergency rescuers.<sup>64</sup> In letter and spirit of this philosophy, grandparents are a stabilizing element amid an ever-changing society.<sup>65</sup>

However, these sentiments do not rest on scientific studies.<sup>66</sup> While some behavioral scientists confirm that "typical grandparents" have a "'companionate' relationship with their grandchildren,"<sup>67</sup> many studies seem to reflect little more than an "intermittent" relationship between

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60. Walther, *supra* note 55, at 96. *But see* CAL. FAM. CODE § 3104(e) (creating a rebuttable presumption that grandparent visitation does not fit the child's best interest if the parents do not allow such visitation).

61. *See* ME. REV. STAT. ANN. tit. 19-A, § 1803(3) (West 1998) (providing for possible grandparent visitation if in the best interest of the child and if visitation does not interfere with the "parent-child relationship or with the parent's rightful authority over the child"); MINN. STAT. ANN. § 257.022(2)(a)(2) (West Supp. 2001) (resembling the Maine provision); NEB. REV. STAT. ANN. § 43-1802(2) (LEXIS Repl. 1999) (providing standard of clear and convincing evidence that grandparent visitation will not "adversely interfere with the parent-child relationship"); R.I. GEN. LAWS § 15-5-24.3(a)(2)(v) (1996) (providing presumption that parents' decision to refuse grandparent visitation is reasonable, rebuttable by clear and convincing evidence). *But see* MISS. CODE ANN. § 19-16-3(2)(a) (1994) (allowing grandparent visitation only upon showing that the parents' objection to visitation is unreasonable); OR. REV. STAT. § 109.121(1)(a)(B) (Supp. 1998) (providing for grandparent visitation only upon denial of "reasonable opportunity to visit").

62. Jeff Atkinson, *Troxel v. Granville: Seeking to Balance the Interests of Grandparents, Children, and Parents*, 14 AM. J. FAM. L. 1, 4 (2000). While all fifty states have grandparent visitation statutes, some states also allow visitation to other classes of people, like great-grandparents (fourteen states), stepparents (nine), siblings of the child (ten), or simply "any person" (twelve). *Id.* at 5 n.28.

63. Bostock, *supra* note 47, at 323-24.

64. *Id.* at 324.

65. *Id.* at 323 n.24. Bostock quotes Representative Olympia Snowe: "Fortunately, amidst our changing society one thing has remained the same: the unique bond that only exists between a child and a grandparent." *Id.* (citing *Grandparents Rights: Preserving Generational Bonds, 1991: Hearing Before the Subcomm. on Human Services of the House Select Comm. on Aging*, 102d Cong., 1st Sess. 103 (1991) (statement of Rep. Snowe)).

66. *See* Walther, *supra* note 55, at 98.

67. *Id.* This study surveyed 510 American grandparents, but excluded the grandchildren. *Id.*

grandparents and grandchildren.<sup>68</sup> Such relationships differ depending on a variety of factors such as “geographical proximity, age, health status, socioeconomic conditions, employment, and marital status of grandparents, as well as the age and gender of the child.”<sup>69</sup> Most significantly, there exist no studies of “intact families under court-ordered grandparent visitation.”<sup>70</sup>

## B. Substantive Due Process: The Liberty to Exercise Parental Rights

There may exist a lack of behavioral studies of intact families under court-ordered visitation, but the law offers its protection whenever individuals join in domestic relationships that the law considers to be a “family.”<sup>71</sup> This subsection briefly investigates the development of the parental rights doctrine under the Fourteenth Amendment Due Process Clause.<sup>72</sup>

### 1. *Due Process Is More than Fair Process*

In *Washington v. Glucksberg*,<sup>73</sup> a case dealing with physician-assisted suicide, the United States Supreme Court acknowledged that the Fourteenth Amendment Due Process Clause “guarantees more than fair process.”<sup>74</sup> The Court also reaffirmed that the Due Process Clause shields “certain fundamental rights and liberty interests” against state interference.<sup>75</sup> While thus confirming the substantive aspect of due process jurisprudence, the Court declined to recognize physician-assisted suicide as a fundamental right.<sup>76</sup> To arrive at this conclusion, the Court conducted a brief, but thorough excursion through history and

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68. *Id.* In one study, criticized for methodological shortcomings, only 30 of 300 grandparents claimed a relationship “other than [an] intermittent one.” *Id.*

69. *Id.* Another study suggests that the degree of grandparental involvement might also depend on gender of the grandparents, marital status of the children, and maternal or paternal lines of the family. *Id.*

70. *Id.*

71. See Hobbs, *supra* note 45, at 519. The author explains that such a family unit usually arises with marriage, but can also come into existence in non-marital cohabitation, and by virtue of the birth of a child (between mother and child). *Id.*

72. U.S. CONST. amend. XIV, § 1 (providing that no “State [shall] deprive any person of life, liberty, or property, without due process of law”).

73. 521 U.S. 702 (1997). Justice Scalia joined the majority opinion. *Id.* at 704.

74. *Id.* at 719.

75. *Id.* at 720 (specifically stating that the Clause offers “heightened protection”).

76. *Id.* at 706. The plaintiffs were physicians in the state of Washington, along with three terminally ill patients and a nonprofit organization, Compassion in Dying. *Id.* at 707-08.

the various state laws on suicide.<sup>77</sup> Even though, in considering physician-assisted suicide, the Court addressed an issue in many ways distinct from parental rights, the issue nonetheless touched on very intimate and personal concerns, just like parental rights. The Court's historical approach illustrates its method of analyzing fundamental rights issues in general, and touches on another, somewhat earlier case involving termination of life, *Cruzan v. Director, Missouri Department of Health*.<sup>78</sup> In that case, a woman remained in a vegetative state after a near-fatal car accident.<sup>79</sup> The Court upheld the state's decision not to allow life-support termination without clear and convincing evidence that termination truly corresponded with the patient's will.<sup>80</sup> Justice Scalia's concurring opinion appeared to have pointed the way for *Glucksberg*.<sup>81</sup> Quite in tune with Justice Scalia's approach, the Court now appears to consider the text of the Constitution, but also history and tradition, as the decisive factors to determine fundamental rights.<sup>82</sup>

Consequently, the Court uses the following fundamental-rights test.<sup>83</sup> First, due process protection extends to those fundamental rights which are "deeply rooted in this Nation's history and tradition"<sup>84</sup> and "implicit in the concept of ordered liberty," so that "neither liberty nor justice would exist if they were sacrificed."<sup>85</sup> The second prong of the fundamental-rights test consists of the Court's requirement of a "'careful description' of the asserted fundamental liberty interest."<sup>86</sup>

It seems a fair summary, then, to conclude that if a right is "deeply rooted" and its protection and concern occurs throughout a substantial part of history, such a right is fundamental, and consequently enjoys Fourteenth Amendment Due Process protection.<sup>87</sup> Therefore, at least certain legal scholars argue that it seems high time to turn toward parental rights and liberty as fundamental rights.<sup>88</sup>

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77. *Id.* at 710-19.

78. 497 U.S. 261 (1990).

79. *Id.* at 266.

80. *Id.* at 284.

81. See *Glucksberg*, 521 U.S. at 711 (citing Scalia's concurrence in *Cruzan* regarding the immense Anglo-American common-law history against suicide and assisting suicide).

82. See *Cruzan*, 497 U.S. at 294 (Scalia, J., concurring).

83. See *Glucksberg*, 521 U.S. at 720-21.

84. *Id.* (citing, among others, *Moore v. City of East Cleveland*, 431 U.S. 494, 502 (1977) (plurality opinion)).

85. *Id.* at 721 (citing *Palko v. Connecticut*, 302 U.S. 319, 326 (1937)).

86. *Id.* (citing *Reno v. Flores*, 507 U.S. 292, 302 (1993)).

87. See *id.*

88. See, e.g., Atkinson, *supra* note 62, at 3.

## 2. *Parental Rights and Liberty*

Just as Justice O'Connor noted in the *Troxel* case, parental interest in virtually all aspects of child rearing might well be the first fundamental liberty that the Supreme Court recognized.<sup>89</sup> This subsection examines some of the main cases that established parental interests and liberties as a fundamental right.

- a. The liberty to have a home, raise children, and control their education

A little more than seventy-five years ago, the United States Supreme Court acknowledged in *Meyer v. Nebraska*<sup>90</sup> the right of parents to make a home and raise children<sup>91</sup> and to control their education.<sup>92</sup> In *Meyer*, a Nebraska school teacher ran afoul of a state statute that prohibited the teaching of foreign languages to students who had not passed the eighth grade.<sup>93</sup> While the Court's analysis at times approached that of an Equal Protection Clause challenge,<sup>94</sup> the opinion stayed clearly within the parameter of the Due Process fundamental rights analysis.<sup>95</sup> The Court specifically referred to the historical

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89. *Troxel v. Granville*, 530 U.S. 57, 65 (2000). On a more general note, the common-law tradition did not afford grandparents any more rights to visit their grandchildren than any person outside the family would have had. Bostock, *supra* note 47, at 326. Fit parents could block grandparents visitation under the parental rights doctrine. *Id.* This doctrine protected parental autonomy. *Id.* at 328. As a quaint aside, civil law traditions were quite similar, as a nineteenth-century Louisiana case demonstrated. See *Succession of Reiss*, 15 So. 151, 152 (La. 1894) (holding that during the parents' lifetime, grandparents have no right of action regarding the grandchildren).

90. 262 U.S. 390 (1923). *Meyer*, like *Troxel*, draws heavy criticism from those who see substantive due process as a constitutional error. See, e.g., Gregory J. Sullivan, *Troxel Was a Bad Law, But Not an Unconstitutional One*, N.J. L.J., July 24, 2000, at 27 ("[T]he Court has used the due process clause to determine whether the substance of the law is acceptable. If a majority of the Court disagrees with the law, then it is declared unconstitutional, even though it transgresses no provision of the Constitution.").

91. See *Meyer*, 262 U.S. at 399.

92. See *id.* at 400.

93. *Id.* at 397; see also Andrew Schepard, *Muddled Impact of the High Court's Grandparent Visitation Decision*, N.Y. L.J., July 13, 2000, at 3 (pointing out the post-World War I hostile attitudes toward Germany implicit in the *Meyer* case).

94. See *Meyer*, 262 U.S. at 401 (referring to the fact that Latin, Greek, and Hebrew were not within the prohibition, but all modern languages were).

95. See *id.* at 399-400. The Court inquired whether the state "unreasonably infringe[d]" on a Fourteenth Amendment liberty. *Id.* at 399. Thus, using a balancing test, the Court found that Nebraska had not made a successful case for state interference. *Id.* at 403. Incidentally, the case also involved religious aspects, in that the

significance of education in America and the role of the parent to provide education "suitable to their station in life."<sup>96</sup>

Only a few years after *Meyer*, the Supreme Court reaffirmed in *Pierce v. Society of Sisters*<sup>97</sup> the parental right to control children's education.<sup>98</sup> The Court buttressed the earlier *Meyer* decision in the face of an Oregon statute requiring every child between eight and sixteen years old to attend public school.<sup>99</sup> Guardians or parents had to comply upon threat of a misdemeanor prosecution.<sup>100</sup> The Society of Sisters was a corporation caring for orphans and running Catholic schools.<sup>101</sup> The Oregon Act caused parents to withdraw their children from Society of Sisters establishments.<sup>102</sup> After a brief balancing of state and private interests, the Court emphasized in its holding that parents and guardians have the liberty to "direct the upbringing and education of children under their control."<sup>103</sup> Oregon's legislation had no "reasonable relation" to a competent state purpose, and thus violated constitutionally guaranteed rights.<sup>104</sup>

b. *Prince v. Massachusetts*<sup>105</sup>—Limits on the right to "custody, care, and nurture"

During the last years of World War II, the United States Supreme Court confronted a Massachusetts child labor law provision<sup>106</sup> and

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school at issue was a Lutheran institution, and, thus, the teaching of German was at least arguably also a religious concern. *Id.* at 397. After all, the Lutheran school, based upon a German-origin denomination, used German-language Biblical stories. *See id.*

96. *Id.* at 400 (holding that the right of parents to hire somebody to teach their children a foreign language is "within the liberty of the Amendment").

97. 268 U.S. 510 (1925).

98. *See id.* at 534-35.

99. *See id.* at 530. The Compulsory Education Act of 1922 contained certain exemptions that were irrelevant in the case. *Id.* at 530-31.

100. *Id.* at 530.

101. *Id.* at 531-32.

102. *Id.* at 532.

103. *Pierce*, 268 U.S. at 534-35. The Court specifically pointed out that the "child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.* at 535.

104. *Id.* at 535.

105. 321 U.S. 158 (1944).

106. *See id.* at 160. The provisions stated that "no boy under twelve and no girl under eighteen shall sell [anything] in any street or public place." *Id.* at 160-61. Supplying children with articles for sale, for the purpose of having the children commercially distribute those goods, constituted a misdemeanor. *Id.* at 161.

upheld it.<sup>107</sup> Sarah Prince, a Jehovah's Witness, was the aunt and custodian of a nine-year-old girl, Betty Simmons.<sup>108</sup> The child was a member of the same religion.<sup>109</sup> As Jehovah's Witnesses, both Sarah and Betty distributed pamphlets on the streets of Brockton, Massachusetts, and received small funds in return.<sup>110</sup> The State accused Sarah of using Betty for child labor.<sup>111</sup> Notwithstanding the Court's affirmation of the states' right to regulate child labor,<sup>112</sup> the Justices took care to point out that parents have a right to handle "custody, care and nurture of the child" themselves.<sup>113</sup> The Court highlighted the "private realm of family life" that remains beyond the grasp of state intervention.<sup>114</sup> The opinion thus distinguished between the state's legitimate interests as *parens patriae*<sup>115</sup> and the private parental liberties.<sup>116</sup> The distribution of religious pamphlets by children accordingly did not enjoy constitutional protection because such activity did not fall within the scope of private family matters.<sup>117</sup>

c. *Wisconsin v. Yoder*<sup>118</sup>—The "primary role" of parents as an "enduring American tradition"

Approximately thirty years ago, the state of Wisconsin sought to compel Amish children to attend public school beyond the eighth grade.<sup>119</sup> The Amish refused outside, public school education beyond the eighth grade because in their view, secular education impermissibly

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107. *Id.* at 170.

108. *Id.* at 159.

109. *Id.* at 161. Sarah Prince also had two sons, who accompanied her during the time in question, but their actions were not at issue here. *Id.* at 161-62.

110. *Id.* at 161-62. Apparently, distribution of pamphlets did not always result in receiving funds. *Id.* at 161 n.4.

111. *Prince*, 321 U.S. at 160.

112. *See id.* at 166.

113. *Id.*

114. *Id.*

115. Latin for "parent of [the] country." BLACK'S LAW DICTIONARY 1137 (7th ed. 1999). Generally, the term indicates the state's role in guarding the legally disabled (juveniles or insane). *Id.*

116. *See Prince*, 321 U.S. at 166; *see also* Joan C. Bohl, *Grandparent Visitation Law Grows Up: The Trend Toward Awarding Visitation Only When the Child Would Otherwise Suffer Harm*, 48 DRAKE L. REV. 279, 285-86 (2000) (emphasizing the "narrowness" of the *parens patriae* exception to parental rights).

117. *See Prince*, 321 U.S. at 166-67.

118. 406 U.S. 205 (1972).

119. *Id.* at 207. Wisconsin law provided compulsory school attendance until the child reached the age of sixteen. *Id.* The Amish children, Frieda, Barbara, and Vernon, were between fourteen and fifteen years of age. *Id.* at 207 n.1.



and significantly interfered with their faith and "Ordnung."<sup>120</sup> The State subjected the parents to a trial and fined them five dollars each.<sup>121</sup> The Court concluded that *Yoder* implicated "fundamental interests of parents" even more so than *Prince*.<sup>122</sup> The Court referred to the "history and culture of Western civilization [reflecting] a strong tradition of parental concern for the nurture and upbringing of their children."<sup>123</sup> Finally, the Supreme Court concluded that this "primary role of the parents in the upbringing of their children is now established beyond debate as an *enduring American tradition*."<sup>124</sup> Consequently, Wisconsin lost its case.<sup>125</sup>

#### d. Other United States Supreme Court cases

The United States Supreme Court has reaffirmed the constitutional protection of parents' rights time and again.<sup>126</sup> In particular, the Court has emphasized the importance of history and tradition in this country, as well as in the entire Western world, supporting the fundamental right of parents.<sup>127</sup> However, the Court has so far confined its constitutional protection of the family to relatives, as in *Moore v. City of East*

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120. *Id.* at 210-11. "Ordnung" here means church rules of the Amish. *Id.* at 210. Post-eighth grade education would expose the Amish children to a setting "with increasing emphasis on competition . . . with pressure to conform to the styles, manners, and ways of the peer group, [taking the children] away from their community, physically and emotionally, during the crucial and formative adolescent period of life." *Id.* at 211.

121. *Id.* at 208. Wisconsin rejected a compromise reached in other states, like Pennsylvania, under which the Amish could comply with the compulsory school requirement by taking their children to an Amish vocational school and requiring the children to keep journals on their daily farm and household duties (like an apprenticeship system). *Id.* at 208-09 n.3.

122. *Id.* at 232.

123. *Id.*

124. *Yoder*, 406 U.S. at 232 (emphasis added).

125. *See id.* at 234.

126. *See generally* *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (affirming most recently the "long line of cases" upholding *Meyer* and *Pierce*); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (reaffirming again the parents' liberty interests in the "care, custody, and management of their child"); *Parham v. J.R.*, 442 U.S. 584, 602 (1979) (pointing out the Court's historical reflection of "Western civilization concepts of the family as a unit with broad parental authority over minor children"); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (affirming the constitutional protection of the relationship between parent and child); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (referring to the "custody, care and nurture" residing "first in the parents") (citing *Prince v. Massachusetts*, 321 U.S. 158 (1944)).

127. *See Parham*, 442 U.S. at 602; *Yoder*, 406 U.S. at 232.

*Cleveland*.<sup>128</sup> In that case, the Supreme Court expanded the familial protection only to the extended family, a grandmother living with a son and grandchildren who were cousins.<sup>129</sup> Probably the most significant point, though, lies in the fact that the Court continued the long line of familial, and thus fundamental, rights cases, while guarding itself with strong cautionary statements against "Lochnerism."<sup>130</sup> Nonetheless, the Court has yet to hold that parental rights arise merely because of a biological, genetic relationship.<sup>131</sup> Instead, parental rights stem from "relationships more enduring."<sup>132</sup> However, ongoing relationships alone are not always sufficient, either, especially where the Court balances a biological father's interests against the interests of an existing family unit.<sup>133</sup>

To summarize, the Court has repeatedly examined American history and tradition, and has concluded that parental rights are, in so many words, "deeply rooted" fundamental rights.<sup>134</sup> However, this

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128. 431 U.S. 494, 498-99 (1977).

129. See *id.* at 504; see also *id.* at 495-97 (relating the facts). The *Moore* case involved a city housing ordinance that accepted only certain relatives as "family" allowed to dwell together in one unit. *Id.* at 495-96.

130. See *id.* at 502. "Lochnerism" refers to substantive due process analysis of a very negative kind, stemming from an infamous United States Supreme Court opinion declaring unconstitutional a state law trying to protect bakery workers by setting maximum working hours. See *Lochner v. New York*, 198 U.S. 45 (1905). The *Lochner* case spawned a brief history of unfortunate judicial decisions, mostly focusing on a "fundamental right to contract," which many modern legal scholars see akin to legal missteps like the ominous and horribly consequential *Dred Scott* decision at the eve of the American Civil War. See Sullivan, *supra* note 90, at 27; see, e.g., *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936) (declaring unconstitutional a state minimum wage law for women); *Williams v. Standard Oil Co.*, 278 U.S. 235 (1929) (declaring unconstitutional maximum prices for gasoline); *Ribnik v. McBride*, 277 U.S. 350 (1928) (declaring unconstitutional maximum prices for employment agencies); *Tyson & Brother v. Banton*, 273 U.S. 418 (1927) (declaring unconstitutional maximum prices for theater tickets); *Weaver v. Palmer Bros.*, 270 U.S. 402 (1926) (declaring unconstitutional a state law prohibiting the use of "shoddy," rags and debris, in making mattresses); *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504 (1924) (declaring unconstitutional a law requiring standardized weights for bread loaves); *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923) (declaring unconstitutional a state minimum wage law for women).

131. *Lehr v. Robertson*, 463 U.S. 248, 260 (1983) (citing *Caban v. Mohammed*, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting)).

132. *Id.* (citing *Caban*, 441 U.S. at 397 (Stewart, J., dissenting)).

133. See *Michael H. v. Gerald D.*, 491 U.S. 110, 123 (1989) (plurality opinion). Justice Scalia pointed out that, according to the precedents, parental liberty instead rests on history and tradition of the "unitary family." *Id.* In that case, the biological father had a relationship with the child (conceived in an extra-marital affair), but the mother had in the meantime returned to her husband, who also had developed a relationship with the child. *Id.* at 113-15.

134. See *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997).

recognition has not come without caution and certain limits.<sup>135</sup> Parents are not free to do with their children entirely as they please,<sup>136</sup> nor is the Court willing to extend the constitutional protection of familial structures beyond family relations,<sup>137</sup> or conversely, merely hinge such protection on relatedness alone.<sup>138</sup> Parents' rights, however, clearly are established fundamental rights.<sup>139</sup>

### 3. *The Presumption That Fit Parents Act in the Best Interest of the Child*

In its discussion of Western family traditions, the Supreme Court has utilized certain presumptions regarding parental fitness and best interest of the child.<sup>140</sup> According to the law, a parent has the "maturity, experience, and capacity for judgment" that a child lacks.<sup>141</sup> The law has long acknowledged that parents act in the best interest of their children because of "natural bonds of affection."<sup>142</sup> Quite naturally, the Court immediately conceded that this presumption remains rebuttable by incidents of child abuse or neglect.<sup>143</sup> Nonetheless, the Supreme Court has refused to "discard wholesale" the general notion that parents attend to the best interest of their offspring.<sup>144</sup>

The presumption of parental fitness bears significance in a variety of circumstances, such as in custody proceedings.<sup>145</sup> The state's interest in child care becomes "de minimis" if the parent indeed is fit.<sup>146</sup> Conversely, in *Quilloin v. Walcott*,<sup>147</sup> the Court held that a parent who has never sought custody, nor had any relationship with the child, cannot raise a best-interest-of-the-child standard and the implicit presumption

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135. See *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

136. See *id.*

137. See *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977).

138. See *Lehr v. Robertson*, 463 U.S. 248, 260 (1983).

139. This note discusses Justice Scalia's concerns regarding the constitutional acknowledgment of fundamental parents' rights in Part IV, as he expressed himself to that extent in his dissenting opinion of the *Troxel* case. See *Troxel v. Granville*, 530 U.S. 57, 91 (2000) (Scalia, J., dissenting); *infra* Part IV.C.

140. See *Parham v. J.R.*, 442 U.S. 584, 602 (1979).

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 602-03.

145. See *Stanley v. Illinois*, 405 U.S. 645 (1972). The State of Illinois attempted to take custody from an unwed father without conducting hearings to determine that the father actually was unfit. *Id.* at 646.

146. *Id.* at 657-58.

147. 434 U.S. 246 (1978).

of a fit parent in attempting to obtain visitation rights after the birth mother had initiated adoption procedures.<sup>148</sup>

The best-interest-of-the-child standard, however, is not actually a constitutional standard.<sup>149</sup> This standard derived from custody proceedings, typically as part of a divorce.<sup>150</sup> In many instances, especially where state institutions have substituted as parents, there does not even exist a best interest standard, but rather a standard of adequate care, or "minimum requirements."<sup>151</sup>

Nonetheless, the presumption of fit parents attending to the best interest of their children weighs heavily in the discussion of parental rights and liberties.<sup>152</sup> The presumption supports the notion of parental rights as a fundamental right, in that it renders a further reason for constitutionally protecting the parent-child relationship.<sup>153</sup>

Thus concluding the background survey of parental right cases before the United States Supreme Court, it appears well established that parental rights fall under the canopy of fundamental rights pursuant to substantive due process analysis.<sup>154</sup> While such parental liberties and rights have their limits,<sup>155</sup> the presumption that fit parents act in the best interest of their children supports the constitutionally protected character of parental rights.<sup>156</sup> How then does the *Troxel* case, with its specific issue concerning grandparental rights, fit into the history of parental rights cases?

#### IV. REASONING

In *Troxel v. Granville*,<sup>157</sup> the United States Supreme Court held that section 26.10.160(3) of the Revised Code of Washington violated the

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148. See *id.* at 247 (laying out the facts); *id.* at 256 (holding).

149. *Reno v. Flores*, 507 U.S. 292, 304 (1993).

150. *Id.* at 303; see also Atkinson, *supra* note 62, at 2 (stating that the best interest doctrine has existed for over one hundred years, "[m]ore often than not" as a kind of balancing test between the competing parental parties' ability to provide for the child).

151. See *Flores*, 507 U.S. at 304.

152. Mary E. O'Connell, *The 'Troxel' Tightrope*, NAT'L L.J., June 26, 2000, at A20. The author makes the connection between *Parham's* fit parent presumption and the constitutional protection of parental rights in that constitutional protection "is the best possible way to protect the interests of children." *Id.*

153. See Bohl, *supra* note 116, at 296 (explaining that fit parents ought to be able to enjoy parental autonomy in a grandparent visitation context regardless of their marital status).

154. See *supra* Part III.B.1-2.

155. See *supra* Part III.B.2.b.

156. See *supra* notes 140-53 and accompanying text.

157. 530 U.S. 57 (2000).

United States Constitution in that it encroached on the fundamental parental right to determine matters of "care, custody, and control" of their children.<sup>158</sup> The Court distinctly limited its holding to the facts of the case before it, referring only to the appellee, Tommie Granville, and her family.<sup>159</sup> After a brief excursion into the history of parental rights cases before the Supreme Court,<sup>160</sup> the plurality opinion of *Troxel* discussed what the Justices deemed the overbreadth of the Washington grandparent visitation statute and its application to the Granville family.<sup>161</sup>

The plurality opinion agreed with the concurring opinions of Justices Souter and Thomas in that parental rights enjoy the constitutional protection of fundamental rights.<sup>162</sup> Additionally, Justice Souter agreed with the plurality opinion in that the Washington statute was unconstitutionally overbroad.<sup>163</sup> Furthermore, Justice Souter also agreed with the plurality that the Court need not decide whether every grandparent visitation statute needs a harm-to-the-child requirement.<sup>164</sup> Thus, the United States Supreme Court upheld parental rights as a fundamental right with a six-vote majority, and declared the Washington statute unconstitutionally overbroad, as well as refused to discuss a harm-to-the-child standard, with a five-vote majority.

#### A. Plurality Opinion<sup>165</sup>

The Court began its analysis of the present case by taking a closer look at what Justice O'Connor's plurality opinion called the "breathtak-

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158. *Id.* at 75.

159. *See id.* at 67.

160. *See id.* at 65-67.

161. *See id.* at 67. Justice O'Connor announced the plurality opinion, joined by Chief Justice Rehnquist, and Justices Ginsburg and Breyer; Justices Souter and Thomas filed concurring opinions; and Justices Stevens, Scalia, and Kennedy dissented. *Id.* at 60. Concerning the overbreadth, Justice O'Connor asked in the oral arguments: "[A]ny person' at 'any time' can march in and ask a court in the best interests of the child to order some kind of visitation? I mean, this is a breathtakingly broad provision, is it not?" Atkinson, *supra* note 62, at 1. Concern with overbreadth reached across the bench, from Justices O'Connor to Scalia. *See id.*

162. *See infra* Part IV.B.

163. *See Troxel*, 530 U.S. at 76 (Souter, J., concurring). Justice Souter actually saw the Washington statute invalidated based on its text alone, not its application, unlike the plurality opinion. *See id.* (Souter, J., concurring).

164. *See infra* Part IV.B.

165. Some commentators chose to view the plurality and the concurrence as a 6-3 majority opinion. *See* Rebecca Porter, *Supreme Court Delivers Narrow Ruling on Grandparents' Visitation Rights*, TRIAL, Aug. 1, 2000, available at 2000 WL 15000437.

ingly broad" language of the statute involved.<sup>166</sup> The statute provided that "[a]ny person" could file for visitation "at any time."<sup>167</sup> The trial court could bestow visitation rights any time it appeared in the "best interest of the child."<sup>168</sup> Hence, the Court found that the statute practically allowed "any third party" to call for judicial review of parental visitation decisions.<sup>169</sup> The Court remarked that the Washington statute did not lend any "presumption of validity or any weight whatsoever" to parental decision-making.<sup>170</sup> Rather, the nonparental visitation provision left the best-interest question entirely with the state judge, enabling the judge to trump the parents' decision.<sup>171</sup>

In tune with its overbreadth analysis, the United States Supreme Court also noted that the state supreme court could have given the statute a narrower reading, but did not do so.<sup>172</sup> Indeed, the trial court proceeded entirely in the spirit of a broad statutory reading.<sup>173</sup> The lower court did not base its order on any specific factors that might have explained the judicial meddling with parental rights.<sup>174</sup> The Court saw itself forced to conclude that section 26.10.160(3) violated the Due Process Clause as applied.<sup>175</sup>

Moreover, the Court remarked that neither the Troxels nor the state court had found Tommie Granville an unfit parent.<sup>176</sup> In light of the legal presumption that fit parents attend to the best interests of their children, this lack of finding on behalf of the lower court became particularly significant.<sup>177</sup> If parents "adequately" attend to the needs of their children, states may not intrude into the privacy of family life and doubt the parents' competence to determine the best course of rearing their progeny.<sup>178</sup>

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166. See *Troxel v. Granville*, 530 U.S. 57, 67 (2000).

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Troxel*, 530 U.S. at 67. Instead, the Washington Supreme Court underlined the broad nature of the statute: "[The statute] allow[s] any person, at any time, to petition for visitation without regard to relationship to the child, without regard to changed circumstances, and without regard to harm." *In re Custody of Smith*, 969 P.2d 21, 23 (Wash. 1998).

173. See *Troxel*, 530 U.S. at 68.

174. See *id.*

175. *Id.* at 75.

176. *Id.* at 68.

177. See *id.* (citing *Parham v. J.R.*, 442 U.S. 584, 602 (1979)).

178. *Id.* at 68-69.

However, according to the Court, the trial court's application of the law even reversed the fit-parent presumption.<sup>179</sup> The trial court did not give "special weight" to Granville's assessment of her children's best interests.<sup>180</sup> In the view of the plurality opinion, the trial judge effectively imposed on Granville the "burden of disproving" that the grandparent visitation served the best interests of the children.<sup>181</sup>

Accordingly, the United States Supreme Court concluded that the trial judge's reversal of the fit-parent presumption did not protect Granville's fundamental right to determine matters of raising her daughters.<sup>182</sup> The Court contrasted the situation with a number of other states' visitation statutes.<sup>183</sup> Given the reality and potential of intergenerational conflicts, a judge should give "at least some special weight" to a fit parent's decisions.<sup>184</sup>

Last, the United States Supreme Court observed that the Granville disagreement arose from a difference of opinion concerning the quantity of visitation, not its total cancellation.<sup>185</sup> Granville maintained her willingness to support some visitation throughout the entire legal battle.<sup>186</sup> The Court focused on the fact that the trial judge discarded the mother's proposal regarding visitation times, and instead arranged for a "middle ground."<sup>187</sup> This judicial action contrasted starkly with other state statutes that provide for grandparent visitation only if a parent has "unreasonably denied" such visitation.<sup>188</sup>

Thus, the United States Supreme Court concluded in a majority that the trial court's reasoning for granting visitation to the grandparents contained constitutional flaws.<sup>189</sup> In particular, the Court pointed out the failure of the lower court to give any "material weight" to a "fit

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179. *Troxel*, 530 U.S. at 69.

180. *Id.* However, Justice O'Connor never explained what "special weight" means. See Schepard, *supra* note 93, at 4.

181. *Troxel*, 530 U.S. at 69. The Court quoted the trial judge: "I think [visitation with the Troxels] would be in the best interest of the children and I haven't been shown it is not in [the] best interest of the children." *Id.*

182. *Id.* at 69-70.

183. *See id.* at 70; see also *supra* note 61 (discussing visitation statutes limiting grandparent visitation rights).

184. *Troxel*, 530 U.S. at 70.

185. *See id.* at 71.

186. *See id.* The Court cited Granville's attorney: "Right off the bat we'd like to say that our position is that grandparent visitation is in the best interest of the children. It is a matter of how much and how it is going to be structured." *Id.*

187. *Id.*

188. *See id.*; see also *supra* text accompanying note 59.

189. *See Troxel*, 530 U.S. at 72. See *infra* Part IV.B for the concurring opinions of Justices Souter and Thomas, agreeing with the Court's fundamental rights analysis.

custodial parent.”<sup>190</sup> Specifically, the Supreme Court found a problem in that the trial court’s only two written fact findings—namely, that the Troxel grandparents are a nearby large family, and that the grandchildren would benefit from such contacts—only served to buttress the trial judge’s pre-conceived presumption favoring the grandparents’ request.<sup>191</sup> However, due process does not allow a state to violate fundamental parental rights concerning “childrearing decisions” just because the state proposed “a ‘better’ decision.”<sup>192</sup>

Nonetheless, the Court deliberately refused to ponder the constitutional question actually before the Court.<sup>193</sup> The Washington Supreme Court had posed the issue whether due process necessitates that every “nonparental” visitation statute contain a requirement of proof of harm to the child as a necessary condition to grant visitation.<sup>194</sup> By declining to delineate the “precise scope” of parents’ rights in grandparent visitation cases, the Court agreed with the dissenting opinion of Justice Kennedy, in that the constitutionality of a visitation statute hinges on its distinct application and the given facts.<sup>195</sup> The Court did not deem it appropriate to hold any nonparental visitation statute unconstitutional “as a per se matter,” since state courts normally adjudicate those disputes “on a case-by-case basis.”<sup>196</sup>

## B. Concurring Opinions

Justice Souter concurred in the judgment, deeming it sufficient that the highest court of Washington had facially invalidated the statute at issue.<sup>197</sup> The Supreme Court Justice expressed some concern that

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190. *Troxel*, 530 U.S. at 72.

191. *Id.*

192. *Id.* at 72-73.

193. *Id.* at 73.

194. *Id.*

195. *Id.*

196. *Troxel*, 530 U.S. at 73. The United States Supreme Court cited a number of state court decisions as well as all fifty states’ grandparent visitation statutes. *See id.* at 73-74. *See also* Fairbanks v. McCarter, 622 A.2d 121, 126-27 (Md. 1993) (equating best-interest standard of a grandparent visitation statute with judicial deliberation of certain factors, such as the nature of the child’s relationships with the parents and grandparents, along with the frequency of interaction, the benefits and detriments of the respective alternatives, etc.); Williams v. Williams, 501 S.E.2d 417, 418 (Va. 1998) (reading a Virginia statute to ask for a “finding of harm as condition precedent to awarding visitation”).

197. *See Troxel*, 530 U.S. at 75 (Souter, J., concurring). Unlike the plurality opinion, Justice Souter saw the Washington statute invalidated based on its text, not its application. *Id.* at 76 (Souter, J., concurring).



needlessly addressing questions of statutory applications not actually before the Court "do[es] not call for turning any fresh furrows in the 'treacherous field' of substantive due process."<sup>198</sup> In Justice Souter's eyes, there existed no reason to go any further.<sup>199</sup>

Nonetheless, the Justice acknowledged the due process protection of parental liberties in raising children<sup>200</sup> as well as the constitutionally overbroad language of the Washington statute.<sup>201</sup> The Supreme Court of Washington, in Justice Souter's opinion, resolved the case accordingly.<sup>202</sup> Since the state supreme court read the statute literally, the statute simply was unconstitutional on its face.<sup>203</sup> Accordingly, Justice Souter quickly dismissed the need to discuss whether harm to the child is a required factor in a grandparent visitation proceeding.<sup>204</sup>

Justice Thomas also concurred in the judgment.<sup>205</sup> The Justice expressly refused to state his view on matters of parental rights and substantive due process, since he did not understand the parties as having challenged such issues.<sup>206</sup> Justice Thomas saw as controlling in this case the United States Supreme Court decisions regarding parental rights.<sup>207</sup> However, the Justice would have liked for the plurality to state the appropriate standard of review, which should have been strict scrutiny in his view.<sup>208</sup>

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198. *See id.* at 76 (Souter, J., concurring) (citing *Moore v. City of East Cleveland*, 431 U.S. 494, 502 (1977)).

199. *See id.* at 75 (Souter, J., concurring). In his view, the state supreme court decided the case on two grounds: (1) the lack of a "harm to the child" standard; and (2) the overbreadth regarding "any person," and "at any time." *See id.* at 76 (Souter, J., concurring).

200. *See id.* at 77 (Souter, J., concurring).

201. *See id.* at 76-77 (Souter, J., concurring).

202. *See id.* at 77 (Souter, J., concurring).

203. *See Troxel*, 530 U.S. at 78 (Souter, J., concurring).

204. *Id.* at 77 (Souter, J., concurring).

205. *Id.* at 80 (Thomas, J., concurring). Justice Thomas's opinion appears particularly interesting, for he is actually a "vigorous opponent" of a fundamental right of abortion, since it has "no textual constitutional foundation." Schepard, *supra* note 93, at 4. However, Justice Thomas may not have been particularly interested in the case, given that he allegedly "spent most of his time [during oral arguments] looking at the walls and rubbing his face [and asking] no questions." Atkinson, *supra* note 62, at 5 n.27.

206. *Troxel*, 530 U.S. at 80 (Thomas, J., concurring).

207. *Id.* (Thomas, J., concurring) (citing *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925)). However, Justice Thomas apparently would have liked to have had an opportunity to discuss the Privileges and Immunities Clause as a possible alternative justification for a constitutional protection of parental rights. *See id.* at n.1 (Thomas, J., concurring).

208. *Id.* (Thomas, J., concurring).

### C. Dissenting Opinions

Justice Stevens dissented.<sup>209</sup> While he would have denied certiorari altogether, the Justice urged that the Court address the federal questions at issue.<sup>210</sup> Justice Stevens disagreed with the Court and the Supreme Court of Washington in the assessment of the federal constitutional issues.<sup>211</sup> In his dissent, he found it particularly unreconcilable that the state supreme court held the statute *per se* unconstitutional, but Justice O'Connor found the statute unconstitutional only *as applied*.<sup>212</sup> Justice Stevens further expressed that the review of trial court legal applications properly should remain the task of state appellate courts, and not of the United States Supreme Court.<sup>213</sup> After all, the trial court had little, if any, guidance "as to the proper test" in grandparent visitation cases similar to the *Troxel* scenario.<sup>214</sup> Justice Stevens asserted that any critique on the trial court decision could only stem from a "guess" of that court's application of the statute.<sup>215</sup> He further disagreed with Justice O'Connor in that he did not see any kind of anti-parent presumption in the trial court's decision.<sup>216</sup>

Additionally, Justice Stevens did not agree with Justice Souter that the Washington Supreme Court allegedly delivered a "definitive construction" of the statute that inevitably rendered it unconstitutional *per se*.<sup>217</sup> Accordingly, Justice Stevens saw himself confronted with an unconstrued state statute and a state supreme court opinion that incorrectly interpreted the Federal Constitution.<sup>218</sup>

The Justice asserted that Washington misinterpreted the overbreadth of the statute as well as the perceived necessity of any harm-to-the-child requirement.<sup>219</sup> Instead, he proposed that a statute should survive facial challenges if the statute employs a "plainly

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209. *Id.* at 80 (Stevens, J., dissenting).

210. *See id.* at 80-81 (Stevens, J., dissenting).

211. *See id.* (Stevens, J., dissenting).

212. *Troxel*, 530 U.S. at 82 (Stevens, J., dissenting).

213. *Id.* at 81-82 (Stevens, J., dissenting).

214. *Id.* & n.2 (Stevens, J., dissenting) (citing *In re Troxel*, 940 P.2d 698, 703 (Wash. Ct. App. 1997) (Ellington, J., dissenting)).

215. *Id.* at 82 (Stevens, J., dissenting). Justice O'Connor, however, pointed out that there "is no need to hypothesize about how the Washington courts *might* apply [the section] because the Washington Superior Court *did* apply the statute in this very case." *Id.* at 74.

216. *See id.* at 82 n.3 (Stevens, J., dissenting).

217. *Id.* at 83 (Stevens, J., dissenting).

218. *Troxel*, 530 U.S. at 84 (Stevens, J., dissenting).

219. *See id.* at 85 (Stevens, J., dissenting).

legitimate sweep."<sup>220</sup> Given such a reading, the most typical petitioner for child visitation, despite any broad statutory language, probably still was a "once-custodial caregiver."<sup>221</sup> Thus, the statute obviously encompassed many permissible applicants, and did not violate the Due Process Clause.<sup>222</sup>

In a similar vein, the Justice knew of no United States Supreme Court case requiring the statute to include a harm-to-the-child standard.<sup>223</sup> Notwithstanding the Court's affirmation of parental rights, the Court has never raised a "rigid constitutional shield" to protect every parental determination possible.<sup>224</sup> Indeed, parental rights have their limits.<sup>225</sup> Justice Stevens noted that "even a fit parent" can treat a child "like a mere possession."<sup>226</sup>

Rather, Justice Stevens advocated the recognition of another party's rights in grandparent visitation disputes: the child's.<sup>227</sup> Even though there exists no Supreme Court opinion on a child's liberty interests in the visitation context, he believed the children's interests should factor into the "equation" between grandparents and parents as well.<sup>228</sup> The Justice cast a wary eye on a parent's "isolated right," in fear that it may lead to a capricious exercise of power over the child.<sup>229</sup> Because the Washington statute at issue did nothing else than to take the children's interests into account as well, a legitimate state concern under the Due Process Clause, Justice Stevens dissented.<sup>230</sup>

For quite different reasons, Justice Scalia also filed a dissenting opinion.<sup>231</sup> He placed parental rights among the "unalienable Rights" set out in the Declaration of Independence and in those rights "retained by the people" under the Ninth Amendment.<sup>232</sup> However, because the Declaration of Independence did not give power to the courts to

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220. *Id.* (Stevens, J., dissenting) (citing *Washington v. Glucksberg*, 521 U.S. 702, 739-40 & n.7) (Stevens, J., concurring)).

221. *Id.* (Stevens, J., dissenting).

222. *Id.* (Stevens, J., dissenting).

223. *Id.* at 85-86 (Stevens, J., dissenting).

224. *Troxel*, 530 U.S. at 86 (Stevens, J., dissenting).

225. *Id.* at 87 (Stevens, J., dissenting).

226. *Id.* at 86 (Stevens, J., dissenting).

227. *Id.* (Stevens, J., dissenting). In fact, Justice Stevens's opinion is the only one specifically focusing on the child's rights. Ronald Nelson, *Troxel v. Granville: The Supreme Court Wades into the Quagmire of Third-Party Visitation*, 12 DIVORCE LITIG. 101, 107 (2000).

228. *Troxel*, 530 U.S. at 88-89 (Stevens, J., dissenting).

229. *See id.* at 90 (Stevens, J., dissenting).

230. *See id.* at 91 (Stevens, J., dissenting).

231. *See id.* (Scalia, J., dissenting).

232. *Id.* (Scalia, J., dissenting).

adjudicate such rights, and the Ninth Amendment did not actually affirmatively enumerate any concrete rights, the issue was not properly before the Court.<sup>233</sup> Justice Scalia would much rather have the state legislatures than the courts discuss unenumerated rights that may have existed in the background of the framers' minds.<sup>234</sup> The Justice repeated his wont criticism of substantive due process rights.<sup>235</sup>

Nonetheless, Justice Scalia refrained from urging the Court to overrule earlier cases of parental rights; he merely wished not to extend the principle to a further application.<sup>236</sup> Justice Scalia showed concern that a judicial adherence to parental unenumerated rights necessarily also invokes the need for creating judicial definitions of what a parent is, and of what constitutes harm to the child.<sup>237</sup> In his view, this leads to a judicially, and federally, dictated body of family law.<sup>238</sup> According to the Justice, this constitutes a situation in which federal judges are no better off making determinations than state legislatures, and indeed, would do so with a greater geographic range of potential harm.<sup>239</sup>

Third, and last, Justice Kennedy dissented.<sup>240</sup> He disagreed with the Supreme Court of Washington's assessment that a harm-to-the-child standard was necessary in every instance.<sup>241</sup> While United States Supreme Court cases support the proposition that states can intervene to shield children from harm, for Justice Kennedy, this is not yet to say that every visitation case must invoke a harm-to-the-child standard.<sup>242</sup> The Justice warned that the Washington Supreme Court operated under the assumption that the parents resisting the visitation always are the "primary caregivers," and those seeking visitation never have a

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233. *Id.* (Scalia, J., dissenting). Indeed, when the attorney for the Troxels began to elaborate on children's constitutional claims, Justice Scalia "bellowed, 'A child does not belong to the courts, a child belongs to the parents.'" Tony Mauro, *Scope of Visitation Law Questioned*, N.Y. L.J., Jan. 13, 2000, at 1, 8.

234. *See Troxel*, 530 U.S. at 91-92 (Scalia, J., dissenting).

235. *See id.* at 92 (Scalia, J., dissenting). In Scalia's view, the split decisions of the present case indicated how little substantive due process rights constitute legal principles of "substantial reliance." *Id.* (Scalia, J., dissenting).

236. *Id.* (Scalia, J., dissenting).

237. *Id.* at 92-93 (Scalia, J., dissenting).

238. *Id.* at 93 (Scalia, J., dissenting).

239. *Id.* (Scalia, J., dissenting). Justice Scalia remarked that Granville only asserted a substantive due process right, but did not give him an opportunity to assess claims of enumerated rights, such as the children's First Amendment rights of association. *Id.* at n.2 (Scalia, J., dissenting).

240. *Troxel*, 530 U.S. at 93 (Kennedy, J., dissenting).

241. *See id.* at 94 (Kennedy, J., dissenting).

242. *Id.* at 97 (Kennedy, J., dissenting).

"legitimate and established relationship" with the children.<sup>243</sup> However, the "conventional nuclear family" has little bearing on the prevailing realities in many families.<sup>244</sup> Rather, Justice Kennedy pondered, a third party seeking visitation probably had assumed some care over the child, building a relationship with the child.<sup>245</sup> Kennedy maintained that states should be able to make laws in consideration of certain relationships, attempting to avoid harm to the child, by implementing a best interest standard.<sup>246</sup>

The application of the best interest standard remained constitutional according to Justice Kennedy, depending on "more specific factors."<sup>247</sup> Family courts in every state address this standard in a variation of fact patterns daily.<sup>248</sup> On that level, parental rights ought to receive constitutional protection by "using the discipline and instruction of the case law system."<sup>249</sup> In the present case, Justice Kennedy would have thus preferred to reverse the Washington holding that the best interest standard is always unconstitutional in grandparent visitation cases.<sup>250</sup> He desired further proceedings to determine the constitutionality of the present case, which to him remained ultimately a task for the state court.<sup>251</sup>

#### V. SIGNIFICANCE

Apart from any existing international interest in American grandparent visitation law,<sup>252</sup> the United States Supreme Court decision

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243. *Id.* at 98 (Kennedy, J., dissenting).

244. *Id.* (Kennedy, J., dissenting).

245. *Id.* (Kennedy, J., dissenting).

246. *Troxel*, 530 U.S. at 99 (Kennedy, J., dissenting).

247. *Id.* at 100 (Kennedy, J., dissenting).

248. *Id.* at 101 (Kennedy, J., dissenting).

249. *Id.* (Kennedy, J., dissenting). *But see* Douglas W. Kmiec, *Family Feud: U.S. Supreme Court Undermines Parental Rights in Troxel*, L.A. DAILY J., June 29, 2000, at 6 (questioning where "in our founding documents does the family law bar get a trial period in which to intrude upon parental judgment").

250. *Troxel*, 530 U.S. at 101 (Kennedy, J., dissenting).

251. *Id.* at 102 (Kennedy, J., dissenting). Justice Kennedy does, however, recognize that the "attorney's fees alone might destroy [the] hopes and plans for the child's future." *Id.* at 101 (Kennedy, J., dissenting). Litigation per se can disrupt family life and require constitutional protection for the family. *Id.* (Kennedy, J., dissenting). However, Justice O'Connor took the same reason not to remand the case. *See id.* at 75. Granville's litigation costs were already substantial enough. *Id.* O'Connor also asked during oral arguments whether it was "fair to require a mother to pay \$100,000 in fees to litigate against the grandparents." Atkinson, *supra* note 62, at 1.

252. *See* Fenton, *supra* note 52, at 27; Ignaz Staub, *Haben Grosseltern ein Besuchsrecht?*, Tagesanzeiger, Jan. 14, 2000, LEXIS, Country & Region, Germany,

in *Troxel* requires a reading on at least three levels, as the subsequent section will illuminate. First, as a parental rights case, *Troxel* provides for a renewed exercise in constitutional interpretation and at the same time reaffirms parental rights against the backdrop of the ongoing substantive due process debate. Second, the Supreme Court case may have a varying impact on the different grandparent visitation statutes in all fifty states, including Arkansas, ranging from no effect whatsoever to potentially successful constitutional challenges. Third, the plurality opinion of Justice O'Connor leaves open the door for a continued development of third-party visitation statutes, even though it held unconstitutional a specific statute as applied to the Granville family.

#### A. Constitutional Reading and the Reaffirmation of Parental Rights

According to the constitutional law scholar Erwin Chemerinsky, the case of Tommie Granville's little daughters and their disappointed grandparents led right into the ongoing debate how to correctly interpret the Constitution.<sup>253</sup> The Court recognized and affirmed the long-standing precedence of parental rights, essentially reflecting common sense in constitutional law.<sup>254</sup> The decision thus "respected the autonomy and integrity of the family."<sup>255</sup>

Some scholars disagree with any use of the substantive due process doctrine, and instead would prefer that the *Troxel* Court had used another clause of the Constitution, the Fourteenth Amendment Privileges and Immunities Clause.<sup>256</sup> According to Professor Amar, the more infamous origins of substantive due process, such as the *Dred Scott*

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News File.

253. See Marcia Coyle, *Do Parents Rights Take Precedence?*, NAT'L. L.J., Jan. 17, 2000, at A10.

254. Richard W. Garnett, *A Victory for the Family*, WALL ST. J., June 6, 2000, at A26.

255. *Id.* Of course, the notion of parental rights as a set of constitutionally protected fundamental rights has its critics. For example, Professor Garnett expressed himself more critically of the *Troxel* decision elsewhere. See Richard W. Garnett, *The Supreme Court Protects Parents' Rights—But at What Cost?*, RELIGIOUS LIBERTIES NEWS (E.L. Wiegand Practice Groups of the Federalist Soc'y, New York, N.Y.), Fall 2000, at 1, 2. In this newsletter, Garnett attacked the substantive due process line of cases and agreed with Justice Scalia's rejection of upholding unenumerated rights. *Id.* However, the professor also recognized that the present case was not before the Court to challenge the validity of the existing parental rights jurisprudence. *Id.* at 2-3; see also Sullivan, *supra* note 90, at 27.

256. See Akhil Reed Amar, *The Supreme Court, 1999 Term Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 122-23 (2000). Notably, Justice Thomas might agree with a Privileges and Immunities analysis. *Troxel v. Granville*, 530 U.S. 57, 80 n.1 (2000).

case,<sup>257</sup> and the lack perceived by substantive due process critics of any textual basis for a constitutional protection of unenumerated rights under the Due Process Clause could constitute sufficient motivation to search for other, essentially more legitimate constitutional grounds to protect certain interests.<sup>258</sup> Under such an approach, the Fourteenth Amendment Privileges and Immunities Clause could serve, by way of the "doctrinal process of generalization, interpolation, and analogic reasoning," to protect a "set of fundamental freedoms."<sup>259</sup> Even though the Fourteenth Amendment lacks a complete list of all privileges and immunities, in this reading, it "presupposes" that those rights manifest themselves elsewhere in documents either formally or informally ratified by the American people.<sup>260</sup> Therefore, any law "utterly outlandish," without any support from a broad array of American documents, could give rise to a judicial declaration that the law is not within the perimeter of our founders' intent—based on "the wisdom of the American people more generally," rather than the preferences of individual Justices.<sup>261</sup>

However, the Court has long ago reeled in some of the more unrestrained and free-wheeling interpretations of unenumerated fundamental rights.<sup>262</sup> Therefore, until the Court definitely departs from any substantive due process jurisprudence in favor of an alternative guarantee of fundamental rights—such as the Privileges and Immunities clause—parental rights cases remain appropriate fundamental rights precedents. The case of *Isabelle and Natalie Troxel*, thus, went into the books as an undeniable reaffirmation of parental rights while also continuing the Court's more recent efforts to curb the outgrowths of a perceived out-of-control unenumerated rights jurisprudence.

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257. *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1851).

258. Amar, *supra* note 256, at 123.

259. *Id.* Professor Amar names the "freedom of expression and of religion, protection against unreasonable searches, the safeguards of habeas corpus, and so on." *Id.* at 124.

260. *Id.* The professor lists the Bill of Rights, Magna Carta, the English Petition of Right, the Declaration of Independence, and state bills of rights. *Id.*

261. *Id.*

262. *Garnett*, *supra* note 254, at 2; e.g., *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937) (overruling previous case law holding unconstitutional minimum wage laws and expressly questioning the constitutional textual basis for a fundamental right of contracting). For examples of what today is commonly seen as overreaching judicial substantive due process analyses, see *supra* note 130.

B. *Troxel*, Forty-Eight Grandparent Visitation State Statutes, and Arkansas

While this note is not the place to thoroughly examine all forty-nine remaining grandparent visitation statutes,<sup>263</sup> a brief glance over some scholars' statutory discussions appears appropriate. Because the Court approached the grandparent visitation issue on a case-by-case basis, other states' grandparent visitation statutes are not necessarily in danger.<sup>264</sup> On the other hand, the Court failed to give the states helpful instruction when it refused to discuss whether the Due Process Clause requires a showing of harm.<sup>265</sup> Nonetheless, many scholars and practitioners discussing the potential impact of the *Troxel* decision on various state laws find that their third-party visitation statutes probably would survive challenges.<sup>266</sup>

Like the majority of states, no Arkansas appellate court or commentator has as of yet taken up the validity of the state's grandparent visitation statute after *Troxel*.<sup>267</sup> Arkansas Code Annotated section

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263. The supplement to the Washington Code states that the United States Supreme Court has found the entire section 26.10.160 unconstitutional in the *Troxel* case. WASH. REV. CODE § 26.10.160 (West Supp. 2001).

264. O'Connell, *supra* note 152, at A20.

265. See Elizabeth Weiss, Comment, *Nonparent Visitation Rights v. Family Autonomy: An Abridgement of Parents' Constitutional Rights?*, 10 SETON HALL CONST. L.J. 1085, 1131 (2000).

266. See Shelley L. Albaum, Harold J. Cohn, & Seth D. Kramer, *Parent's Prerogative: California's Visitation Statutes May Be Subject to Challenge Under 'Troxel'*, L.A. DAILY J., July 11, 2000, at 7 (finding that the California visitation statutes are not overbroad, give significant weight to parental determinations, but may sometimes run afoul of the *Troxel* decision as applied); Suzanne Valdez Carey, *Grandparent Visitation Rights in Kansas: A Review of Troxel v. Granville*, J. KAN. B. ASS'N, Oct. 2000, at 14, 17 (finding that the Kansas statute could encounter constitutional problems, but a proper interpretation and usage of the statute by the state court could save the statute); Kathleen Donelli & Leanne Murray, *The Constitutionality of New York's Grandparent Visitation Statute in Light of Troxel v. Granville*, WESTCHESTER B.J., Spring & Summer 2000, at 19, 24 (finding it possible that New York's grandparent statute fails if state courts do not give "special weight" to parental reasoning, and calling for a narrower statutory interpretation); Fern L. Frolin & Jennifer A. Fabriele, *After Troxel v. Granville: Grandparent Visitation in Massachusetts*, B. B.J., Sept.-Oct. 2000, at 8, 24 (recognizing constitutional limits on states' power to grant third party rights to children, but deeming the Massachusetts grandparent visitation statute safe); David N. Schaffer, *State Law on Grandparent Visitation Needs Revision*, CHI. DAILY L. BULL., June 20, 2000, at 6 (finding that Illinois's grandparent visitation statute may encounter problems until revised because the statute does not require a substantial relationship between child and petitioner, gives the court the final say over the best interest of the child, does not give special weight to parental decisions, has no harm requirement, does not require the court to put in writing the specific reasons for its decision).

267. However, the 83d General Assembly of Arkansas recently discussed a proposal



9-13-103 provides that a court can give grandparents and great-grandparents "reasonable visitation rights" under certain conditions.<sup>268</sup> The court must determine whether a grandparent visitation order is in the best interest of the child.<sup>269</sup> While the Arkansas statute lacks overbroad language such as "any person," the provision does not, at least on its face, require the court to give special weight to the parents' determination regarding grandparent visitation. However, the mere fact that the statute fails to address a potential harm-of-the-child requirement for visitation may not be dispositive under the *Troxel* decision, since the United States Supreme Court refused to rule on the necessity of such a requirement. Nonetheless, the Arkansas statute could encounter potentially successful constitutional challenges if a trial judge applies it in a way that contradicts the *Troxel* ruling. Whenever an Arkansas court determines the best interest of the child in a grandparent visitation proceeding without lending special weight to the parents' point of view, the circumstances may approach the situation in *Troxel* too closely for comfort. Therefore, Arkansas probably would do well to either judicially narrow the interpretation of the statute, or legislatively revise the statute.

### C. An Open Door for Future Developments

Despite the invalidation of the Washington grandparent visitation statute, the *Troxel* decision left the door open for a continued state-ordered third-party visitation.<sup>270</sup> According to some commentators, any attempt of the United States Supreme Court to finally resolve the balancing act between grandparental and parental interests, as well as the child's interests would likely have "crippled the ongoing, if imperfect, efforts of the states" to find suitable solutions to this

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to revise the Arkansas grandparent visitation law, and rejected the revision. Michael R. Wickline, *Senate Panel Balks at Grandparent Visitation Bill*, ARK. DEMOCRAT-GAZETTE, Apr. 12, 2001, at 9A. House Bill 2303 failed in the Senate Judiciary Committee. *Id.* Some representatives detected a judicial uncertainty regarding the current status of the Arkansas law following the *Troxel* case. *Id.* But even if the current Arkansas statute may be "suspect," the proposed bill went too far in that it would have allowed grandparents to petition for visitation even in cases where the parents are not divorced or legally separated. *Id.*

268. ARK. CODE ANN. § 9-13-103 (Michie Repl. 1998). The statute recognizes as triggering events for grandparent visitation petitions death of a parent, divorce, legal separation, or the child being in the care of someone other than a parent, or in certain cases of illegitimate children. *Id.*

269. *See id.* § 9-13-103(2).

270. O'Connell, *supra* note 152, at A20.

problem.<sup>271</sup> A variety of interest groups applauded the *Troxel* decision, albeit for different reasons.<sup>272</sup> The American Association of Retired Persons ("AARP") expressed contentment that the Court had proceeded cautiously, instead of rashly striking down every grandparent visitation statute in the country.<sup>273</sup> Other groups as diverse as the Christian Right and womens' rights groups joined the applause.<sup>274</sup> Within this chorus of agreement arose even the voices of such groups as the Lambda Legal Defense and Education Fund that advocates for lesbian, gay, and other third-party petitioners such as stepparents and other caregivers.<sup>275</sup> Although the United States Supreme Court has declined to express itself on any of those different perspectives on third-party visitation petitions, the mere fact that *Troxel* actually leads to such discussions appears significant. While apparently few people want serious limits on parental rights, many have concerns regarding the rights of third parties, as varying as those concerns may be. Grandparents often raise children, especially in less fortunate economic and social circumstances. Their bonds with the children require some protection, if for no other reason than to safeguard the child's best interest. In addition, the increase in same-sex partnerships fosters the debate over visitation completely outside our traditional understanding of familial connections, when only death or divorce could feasibly result in an unfortunate visitation battle over children. Perhaps the best feature of the *Troxel* decision lies indeed in its limited application and its careful reaffirmation of parental rights. It appears doubtful that many, if any, state statutes will shipwreck on the constitutional cliffs of the *Troxel* case, especially since state legislatures, as well as state courts, have ample opportunity to amend or construe their laws if they perceive problems. Given the existing precedents on parental rights and the Court's careful approach to substantive due process analysis, it appears that *Troxel* was the right decision, even though it failed, quite naturally, to satisfy everybody.

Oliver G. Hahn\*

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271. *Id.*

272. See Tony Mauro, *Grandparent Visitation Law Struck Down*, N.Y. L.J., June 6, 2000, at 1, 2.

273. *Id.*

274. *Id.*

275. Porter, *supra* note 165.

\* J.D. expected May 2002. B.A. in History, summa cum laude, with departmental distinction, University of Arkansas at Little Rock. Here, I would like to express my deepest gratitude for all the helpful comments and suggestions from members of the law school faculty and the law review who have tirelessly helped

